Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1592

ARTHUR F. TURCO, JR.,

Petitioner,

v.

MONROE COUNTY BAR ASSOCIATION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION FOURTH JUDICIAL DEPARTMENT

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In the
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No.

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PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW YORK,
APPELLATE DIVISION, FOURTH JUDICIAL
DEPARTMENT

Petitioner, Arthur F. Turco, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New York, Appellate Division, Fourth Judicial Department, by which he was disbarred from the practice of law.

OPINIONS BELOW

Two opinions were rendered by the Appellate Division of the Supreme Court of New York, dated respectively December 17, 1973 and January 28, 1975. Copies are annexed in the Appendix, 7a and 11a. The New York Court of Appeals rendered no opinion but merely signed an order dated February 19, 1975, denying the motion for leave to appeal and dismissing the appeal taken as of right. A copy is annexed in the appendix, 36a.

JURISDICTION

Petitioner, a practicing attorney of the State of New York, was disbarred by an order of the

Supreme Court, Appellate Division, Fourth Judicial Department, of that State dated January 28, 1975. Permission for leave to appeal was denied by the New York Court of Appeals under date of February 19, 1975. There was no petition for rehearing.

As explained below, petitioner is continuing to practice law by reason of a stay issued by a United States District Court in a collateral proceeding.

By order of this Court dated April 29, 1975, per Mr. Justice Marshall, the time for the filing of this petition was extended to June 19, 1975. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether a State may, consistent with the Equal Protection Clause of the Fourteenth Amendment, deny opportunity for appellate review as a matter of right to attorneys disciplined to the point of disbarment by a lower court of first instance when one appellate review is provided as a matter of right for every other litigant and class of litigants in that State whose rights are determined by a lower court?

2. Whether it was a violation of the Due Process Clause of the Fourteenth Amendment for a State court to adjudicate a lawyer guilty of professional misconduct and subsequently disbar him on the basis of misdemeanor convictions for conduct plainly outside the scope of his functioning as an attorney, where the statutory system for lawyer discipline provides that a misdemeanor conviction does not necessarily establish professional misconduct and where the record shows a refusal to grant any hearing at all on the issue whether the misdemeanor convictions in this case and other facts relationg to petitioner established professional misconduct?

3. Whether an attorney charged with professional misconduct on the basis of prior conviction of a misdemeanor is entitled, under the Due Process Clause, to an opportunity in the disciplinary proceeding to establish his innocence of the misdemeanor charge, where the record shows that the misdemeanor conviction was not the result of trial on the merits but rather was entered on the basis of plea bargaining and a plea of guilty to greatly reduced charges, accompanied by an assertion of innocence?

4. Whether petitioner was not effectively entrapped in that in a proceeding relating to the collateral consequences to be given to a conviction of a misdemeanor he was not permitted to prove his innocence despite the fact that his plea of guilty arose out of plea bargaining with an assertion of innocence under this Court's opinion in North Carolina v. Alford, 400 U.S. 25 (1970), and his plea was entered in reliance upon his ability to establish innocence in any subsequent disciplinary proceeding?

5. Whether it was violative of the Due Process Clause for a State court to base its judgment of professional misconduct and disbarment on a) matters with which the petitioner had not been charged in the disciplinary proceeding and which he was not allowed to refute, b) statements of the prosecution in the misdemeanor proceedings that were merely unsupported allegations as to which there was no right of cross-examination in either the misdemeanor or disbarment proceedings, and c) indictments which had been withdrawn?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are:

1) Section 1 of the Fourteenth Amendment to the Constitution of the United States;
2) New York Constitution, Article 6, Sec. 3;
3) New York Judiciary Law, Sec. 90, Pars. 2 and 8.

These are all set forth in the Appendix, 1a-6a.

STATEMENT OF THE CASE

Arthur F. Turco, Jr., petitioner herein, was admitted to the New York Bar on December 21, 1967, in the Appellate Division, First Department.

After several years of successful practice, during which he represented many clients involved in unpopular causes, the petitioner on or about February 14, 1972, pleaded guilty to the misdemeanor of common law assault in Baltimore, Maryland. Subsequently, on March 8, 1972, petitioner entered a guilty plea in the Criminal Court of New York City to the misdemeanor of possessing a dangerous weapon.

The proceedings in Maryland arose out of a complex indictment which charged petitioner and others with grave offenses, including conspiracy to commit murder, all arising out of a series of events involving the Black Panther Party, which petitioner had been representing.

Petitioner was brought to trial but only after he had been held without bail for 10 months, most of which were spent in solitary confinement, which had a devastating impact upon his health. The jury disagreed. Petitioner, who had been functioning as an attorney on behalf of the Black Panthers and who was the only white among the defendants, alone was set for retrial by the prosecutor, all of his co-defendants having been acquitted or having

had their cases dismissed at the request of the prosecutor.

When he was called for retrial, petitioner was given the choice of proceeding as the sole defendant on a charge of conspiracy to commit murder, assault with intent to murder, soliciting to commit kidnapping, and common law assault, or accepting a plea to a misdemeanor of assault with a commitment by the prosecutor that there would be a recommendation of no custodial sentence.

Petitioner, with a vigorous insistence of innocence of all charges made by his counsel on the record, opted for the plea of this minor charge, in the face of massive pretrial publicity and hysteria in the community which had been generated against him; legitimate fear for the safety of his family as a result of hate-group threats and intimidation from unidentified persons; repeated threats of bail revocation; a seriously ill wife; lack of funds to pay and retain local counsel; and the prosecutor's making it clear that if he did not plead to the minor misdemeanor charge, trial would be pressed on each of the foregoing grave charges involving aspects of murder.

But even this extraordinary choice, made with an assertion of innocence, was not resolved in the petitioner's mind until his counsel had first ascertained from the Bar Association of the City of New York that a plea to a misdemeanor would not result in automatic disbarment and that petitioner would have an opportunity to explain the circumstances of his plea to a referee in the State of New York and to establish his innocence.

A similar situation obtained in New York, where petitioner had been charged with possession of dangerous weapons, dangerous drugs, and

hypodermic instruments.[1] A guilty plea was entered to the misdemeanor of possession of a dangerous weapon, with an assertion of innocence, the plea being offered under this Court's decision in North Carolina v. Alford, 400 U.S. 25 (1970).

The foregoing pleas were entered in February and March of 1972 and concerned incidents which allegedly occurred in July 1969 and February 1970. By August of 1971, petitioner had relocated to Rochester, Monroe County, New York, and had begun a successful and highly respected law practice.

On May 8, 1973, more than a year after the pleas, the Monroe County Bar Association instituted disciplinary proceedings against petitioner, based solely on the aforementioned pleas of guilt.

Under date of December 17, 1973, the Appellate

1/ The Appellate Division states petitioner was also charged with obstructing government administration. That is not so.

To put the New York charges in perspective it should be noted that the hypodermic instruments and accompanying insulin were demonstrably for petitioner's diabetic condition, and in pretrial proceedings their use as evidence was suppressed--a fact completely ignored by the Appellate Division. The dangerous drugs (marijuana) and dangerous weapons were not shown to be owned by petitioner and he was charged solely because these items were found in an apartment in which he was temporarily staying. Beyond that, they were found in the owner's bedroom, which was not occupied by petitioner--yet the owner was not charged! Indeed, a total of 10 defendants were charged with criminal offenses out of this episode and all charges against defendants other than the petitioner were dismissed.

Division of the Supreme Court of New York, Fourth Department, adjudicated the petitioner guilty of professional misconduct. This decision was based exclusively on the petition of the Monroe County Bar Association, to which were attached copies of the transcripts of the proceedings in Maryland and New York, at which pleas were entered and the answer of petitioner in which he expressly declared his innocence, pointing out that he had done so when he entered the pleas, and sought a hearing and an opportunity to establish his claim of innocence.[2]

2/ Petitioner's statement in his answer was as follows:

"Although I have asked that the charges against me be dismissed in view of the facts developed in this answer, in the event the Court feels the proceedings must go forward, I think it is essential that a hearing be conducted before a judicial officer. It is uncontroverted that when I entered my plea in both cases I made it clear to the New York court and the Baltimore Court that I was innocent. That plea, which is constitutionally authorized under Alford v. North Carolina, 400 U.S. 25 (1970), should allow a person to go behind his plea when serious sanctions may flow from the conviction, such as in this case the disciplinary proceedings. The Alford case specifically recognizes that a man may be motivated to plead guilty for considerations separate and apart from guilt. Since that case acknowledges that a person may plead guilty who is in fact innocent, I think I should be allowed to assert my innocence in these proceedings which are unconnected in any way with the criminal proceedings in Baltimore and New York. In other words, I should be allowed to satisfy a fact-finding officer appointed by this

[Footnote continued on next page.]

The Appellate Division did not grant a hearing of any type and, on the basis of the foregoing pleadings only, found petitioner "guilty of professional misconduct in his office as an attorney and counselor at law."

It is clear that under the New York disbarment statute not all misdemeanor convictions sustain a finding of unprofessional conduct; the matter is left to case-by-case determination, in which the conviction and its underlying facts are but one element. Matter of Kimball, 33 N.Y. 2d 586, 347 N.Y.S. 2d 453 (1973); In re Keogh, 25 App. Div. 2d 499, 267 N.Y.S. 2d 87, modified on other grounds, 17 N.Y. 2d 429, 266 N.Y.S. 2d 985, 214

[Footnote continued from previous page:]

Court that I was not guilty of possessing a dangerous weapon, nor was I guilty of common assault in Baltimore. The real issue before this tribunal is whether I have committed acts or offenses affecting my performance as a lawyer. If a judicial officer appointed by this Court were to determine on all the facts that I did not assault Mr. Anderson in Baltimore, and in fact never even knew him or saw him in my life, and did not possess either of the handguns found in Larry Weiser's bedroom closet in New York City, then it would seem to me there would be no basis for my being disciplined. At a hearing I could produce positive proof which would satisfy a hearing officer that I did not assault Mr. Anderson, nor did I possess the handguns in New York City. Therefore, if the charges are not dismissed outright, I most respectfully request that an appropriate hearing officer be appointed to hear and determine these facts which, although we submit are undisputed, may be contested."

N.E. 2d 163 (1966).

In this case, the Appellate Division's decision of December 17, 1973 includes no explanation of its basis. It merely states that the "acts [sic] of which respondent stands convicted constitute professional misconduct." On the record before it, the only undisputed facts were the convictions themselves. All other aspects, e.g., whether petitioner was in fact guilty, why he entered the pleas, the factual background of the alleged crime, were at issue and petitioner had expressly sought and been denied a hearing on those matters.

On the question whether petitioner would be permitted to prove his innocence, the Appellate Division said:

> "In his answer respondent admits the convictions but seeks to prove that in fact he was not guilty of the charges to which he plead guilty; ... We ... conclude that North Carolina v. Alford (400 U.S. 25), on which respondent relies, does not support his contention that he has the right now to prove that he was not guilty of the charges as he plead."

The Appellate Division did grant petitioner leave to request a hearing on the question of "mitigation" of punishment and decided that such hearing be had before a referee with power to report but not to recommend.

The mitigation hearing commenced on March 28, 1974, before the Honorable Lyman H. Smith, a Supreme Court Justice, and was concluded on May 21, 1974. Justice Smith's findings were reported to the Appellate Division without recommendation on October 25, 1974.

The hearing included a probably unprecedented outpouring of support for a lawyer. There were

forty-eight witnesses testifying on behalf of the petitioner, including a sitting United States District Court Judge, four sitting justices of the Supreme Court of New York, four sitting New York County Court judges, two sitting Rochester City Court judges, three sitting Justices of the Peace, a former Attorney General of the United States, four lawyers who were either then or had been trustees of the Monroe County Bar Association, the District Attorney of Cayuga County, the First Assistant District Attorney of Monroe County, the Bishop of the Episcopal Diocese of Rochester, and numerous other prominent lawyers and citizens of the community, all testifying to the extraordinary reputation for integrity and competence which the petitioner had earned. Mr. Turco himself testified in explanation of the incidents to which he had pleaded guilty, expressly denying his guilt, but, since the Appellate Division had already determined the issue of guilt on the two misdemeanor counts without a hearing and had made clear that it would not go behind the convictions to consider evidence as to innocence, Mr. Turco's attorney preserved his record by listing a wide range of witnesses Mr. Turco would have called to corroborate his claim of innocence if he had been allowed to relitigate the issue and prove his innocence. He also referred to documentary evidence which would absolutely have confirmed such testimony.

Petitioner's claim of innocence with respect to the Maryland charges was based upon a solid alibi supported by the proffered testimony of at least eight individuals, most of whom plainly had no interest in the matter and whose testimony was buttressed by documentary evidence. By contrast, the testimony which the State said it would present repeated a story told at the first trial by the main prosecution witness, whose testimony the trial

judge found so inconsistent with the documented facts that after cross-examination he struck completely all of his testimony as being incredible. 3/

3/ In the first trial, the main witness, Mahoney Kebe, told essentially the story repeated by the Appellate Division but his testimony was stricken when it was established that he was attributing to Mitchell a conversation with him in the presence of Turco about killing Anderson, which conversation was alleged to have occurred at Panther headquarters at a time when court and jail documents established both that Mitchell was in jail and that Turco was at the court house seeking to bail him out.

The prosecutor's statement at the taking of the plea did not change the essentials of the story; she simply indicated that other witnesses would supply the same story that Kebe had offered at the first trial. The statement of the prosecutor also relied on Sam Walters to repeat his testimony given at the first trial. On cross-examination at that trial, Walters admitted that at the direction of his superiors he had perjured himself by attributing to Turco acts which his typed reports showed had been committed by Mitchell and that, also at the direction of his superiors, he had altered reports in pencil to insert Turco's name. Walters was a police officer.

It should be noted that at the time of the entry of the plea there was a stipulation as to what the State witnesses would testify to, but obviously the stipulation referred only to their testimony on direct. At the first trial it was on cross-examination that their testimony was effectively shown to be untruthful. The trial judge at the acceptance of the plea acknowledged that "discrepancies were developed at some length on cross-examination."

As to the New York proceeding, even the prosecutor was on record as admitting, after the entry of the plea, that investigation had confirmed that Turco had neither leased nor rented the premises in question. He also admitted that weapons, possession of which had been charged to Turco, had not even been found in his room.

After hearing oral argument on petitioner's mitigation claims, the Appellate Division rendered its judgment of January 28, 1975, disbarring the petitioner. Leave to appeal was denied by the New York Court of Appeals.

The Appellate Division opinion on mitigation, after first acknowledging that it refused to permit petitioner to establish his innocence, then proceeds for four pages to recount as proven fact mere statements by the prosecutor in Maryland as to what she claimed she would prove if a retrial were had. It should be clear that none of this material was the subject of testimony at the mitigation hearing, where there could be confrontation or cross-examination. This recounting by the Appellate Division was based exclusively on what the prosecutor said before the Maryland court on the proceedings relating to the acceptance of the plea as to what the State's witnesses would have testified to on direct examination.

By contrast, the Appellate Division relegated to a single sentence statements made on behalf of the petitioner by his counsel at the Maryland hearing as to the countervailing facts establishing a documented alibi. Moreover, in a manner which wholly distorts the transcript of the record before the Maryland court, the Appellate Division tried to make it appear that in the proceedings there the petitioner did not assert his innocence, whereas it is absolutely clear that he did. 4/

4/ A careful reading of the record in Maryland

[Footnote continued on next pg.]

Particularly distorted is the Appellate Division's statement as to "the essence of respondent's [Mr. Turco's] testimony on the mitigation hearing" which suggests that he sought mitigation because of four circumstances set forth in the footnote below, 5/ without indicating that his major contention was that he was innocent of the charges to which he had entered pleas.

[Footnote continued from previous page:]
shows that the issue was as follows:

The State objected to a statement as to what Mr. Turco would personally testify and insisted that his counsel's statement of innocence be limited to a statement as to what a whole range of other alibi witnesses would testify. On that basis, the State went along with the plea and the continued assertion by counsel that petitioner was in fact innocent.

5/ "(1) that because of his active defense of minority persons in Maryland, especially blacks, he could not get a fair trial there...; (2) that his wife's ill health and the expense of defending himself against the New York County charges were also why he pled guilty there; (3) that he has been devoted to the defense of minority groups and underprivileged persons, largely without fee, and has performed a public service for which he should be commended instead of being charged with unprofessional conduct; and (4) that since his convictions he has conducted himself in an exemplary manner, continuing to defend the poor and defenseless and unpopular causes, and should be permitted to continue to do so." (At pp. 13-14.)

Moreover, the Appellate Division proceeds, as it says, to weigh "the facts which the State of Maryland and the People of New York stated that they would prove upon a trial to establish respondent's guilt" (p. 14) against petitioner's "version of the facts underlying and surrounding the convictions" (ibid.; underscoring supplied), without recognizing that the entire proceeding had been truncated since ab initio petitioner had been denied his right to prove his innocence. Thus, the hearing, by virtue of the December 17, 1973 decision of the Appellate Division, included only petitioner's "version" of the facts and not his many supporting witnesses, who would have corroborated his claim of alibi in Maryland and his defense in New York.

In order fully to protect his position, and while preparing to present this petition, proceedings were begun in the United States District Court for the Western District of New York in an action entitled Arthur F. Turco, Jr. v. The Monroe Co. Bar Association and the Appellate Division of the Supreme Court, Fourth Judicial Department, Civ. Action No. 75-100, to enjoin the disbarment on the ground that the proceedings before the Appellate Division violated his Constitutional rights. Petitioner further sought a declaratory judgment that the statutes of New York which deny appeal as of right from attorney disciplinary proceedings are unconstitutional as a denial of equal protection of the law, in that New York lawyers are the only class of persons who are denied an appeal as of right from the tribunal of original jurisdiction. 6/ Petitioner's request for a stay was granted.

6/ Petitioner's proceeding before this Court simultaneously with an independent proceeding before the United States District Court is in accord with the procedure employed in Mannes v. Mayers, __ U.S. __, 42 L. ed. 2d 574, 583 (1975).

Under date of May 12, 1975, the District Court heard argument on plaintiff's motion for a temporary injunction and defendants' cross-motion for dismissal. As of the submission of this petition, neither of these motions has been decided and the stay continues in effect.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER A STATE DENIES EQUAL PROTECTION OF THE LAWS WHERE IT PERMITS AN APPEAL OF RIGHT TO EVERY LITIGANT WHO APPEARS BEFORE ONE OF ITS COURTS OTHER THAN AN ATTORNEY CHARGED UPON A DISCIPLINARY PROCEEDING BEFORE ONE OF ITS LOWER COURTS, BUT INCLUDING ALL NON-ATTORNEYS CHARGED UPON A DISCIPLINARY PROCEEDING; AND WHETHER A STATE DENIES DUE PROCESS OF LAW WHEN IT DENIES APPELLATE REVIEW WHEN IT HAS NOT ACCORDED A FAIR HEARING BELOW.

Denial of Equal Protection

It will be observed that following the Appellate Division's decision, petitioner filed with the Court of Appeals of New York both a notice of appeal as of right and a petition for leave to appeal. The appeal taken as of right was dismissed on the Court's own motion for want of a "substantial constitutional question;" the petition for leave to appeal was also denied. Both actions appear in the order of the New York Court of Appeals dated February 19, 1975 (36a).

This Court has held that, once a State legislature provides for an appellate process, it may not deny an appeal to a selected class of litigants on an arbitrary or capricious basis.

> "When an appeal is afforded ... it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Lindsey v. Normet, 405 U.S. 56, 77 (1972).

In New York, the State legislature has provided that all litigants--criminal and civil--other than attorneys charged in disciplinary proceedings have at least one appeal as of right, on all questions of law and fact, from the decision of the trier-of-fact. (In the Appendix hereto, 37a-41a, we set forth a complete analysis of the opportunities for appellate review as of right under New York law.)

Under the New York Attorney-Disciplinary Statute, the Appellate Division is the court of original jurisdiction, or trier-of-fact, in attorney disciplinary proceedings. It does not sit, or review its referee's report, as an appellate tribunal. See, Cohen and Karger, Powers of the New York Court of Appeals, §108, at 152 (1951). But, pursuant to the statute, an attorney has no appeal as of right from the Appellate Division to the Court of Appeals (the only available appellate tribunal) on all questions of law and fact. (See 37a.)

The disciplined attorney will have an appeal only if he can satisfy the Court of Appeals that he has a Constitutional issue or he can apply for permission to appeal to the Court of Appeals. But this is plainly insufficient to eliminate the equal protection problem for at least two reasons: First, no other New York litigants have to apply for permission to appeal; they have at least one appeal, on all questions, as of right. Second, even if the

attorney's motion for permission to appeal is granted, the scope of review under the statute is expressly limited to questions of law--whereas all other litigants have a right to at least one review on all questions, both of law and fact. 7/

We recognize that equal protection does not bar the State from making reasonable classifications among citizens. But there is no rational State policy served by denying attorneys the right to a review of orders which strip away their licenses, their livelihoods, and their reputations.

The State may seek to justify such denial by pointing to the special relationship between courts and lawyers. But that relationship provides no justification for depriving attorneys of minimal procedural safeguards.

The State may also argue that disciplinary proceedings of professionals are not of the same class as ordinary civil or criminal litigations. Even if that were true, equal protection would still be denied, for the State gives to all other New York professionals (aside from lawyers) a right to at least one judicial review of a disciplinary determination against them--and the scope of that review embraces all questions of law and fact, including the substantiality of the evidence.

Only one lower court decision has touched this question, Javits v. Stevens, 382 F. Supp. 131 (S.D. N.Y., 1974). The court ruled that the circumscribed appellate procedure in New York attorney disciplinary proceedings are not unconstitutional, but that decision was made in a case where the

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7/ Hence, even if the Court of Appeals decides to review the attorney's case, it must nevertheless sustain the Appellate Division's finding of guilt if there is any evidence to support it--even if only the proverbial scintilla. See, Matter of Goodman, 199 N.Y. 143, 92 N.E. 211 (1910).

Appellate Division had affirmed the findings of its referee. But here the Appellate Division expressly directed the hearing officer to make no recommendation.

New York's denial to its disciplined lawyers of a right to appeal is not only plainly violative of the equal protection principles of Lindsey v. Normet, supra, but is also directly at odds with lawyer disciplinary procedures in all other States. New York appears to be unique in that it provides for disbarment by one of its lower courts and yet affords no appeal as of right. There are many States which effect disbarment by a proceeding brought before the highest court by a bar association or other body charged with prosecuting and taking testimony on disciplinary charges. 8/ Obviously there can be

8/ Alaska R. Ct. P. Admin., Alaska Bar R. (Supp. 1966); Ariz. R. Sup. Ct. (1973); West Ann. Calif. Bus. & Prof. Code 6100, et seq. (1974); Colo. Rev. Stat. Ann. R. G. P., §§ 241-259 (1973); Del. Code Ann. R. Sup. Ct. 32 (rev. 1974); Hawaii Rev. Stat. Title 32, §605 (Supp. 1974); Idaho Code Title 3, ch. 3 (1974); Smith-Hurd Ill. Ann. Stat., ch. 110A, §§751-753 (1968); Burns Indiana Stat. Ann. Ct. R. 23 (1974); Kan. Stat. Ann., ch. 7, R. Sup. Ct. 7-124 (Supp. 1974); Ky. Rev. Stat. R. Ct. App. (1974); La. Rev. Stat. Ann., Art. 15, ch. 4(1974); Minn. Stat. Ann., §480.05, et seq. (1971); Miss. Code Ann., §73-3-301, et seq. (Supp. 1974); Mont. Stat., §93-2017, et seq. (1973); Neb. Rev. Stat., §7-114, et seq. (1955); Nev. Sup. Ct. R. 99, et seq. (1957); N.H. Rev. Stat. Ann., §311.8 (1966); N.J. Sup. Ct. R. 1:20 (1971); N.M. Stat., §§18-1-17 to 21-2-1(3)(1953); N.D. Cent. Code, §27-14-02 (1974); 5 Okla. Stat. Ann., §13 App. (Supp. 1975); Ore. Rev. Stat.,§§9.560 to 9.480 (Supp. 1975); Pa. Sup. Ct. R. 17 (1974); Gen. Laws R.H., Sup. Ct. R. 10 (1970); S.D. C.L., ch. 16-19-1 to 16-19-19

[Footnote continued on next page.]

no appeal when the highest court is also the court of first instance. In eight States that provide for disbarment by a lower court, an appeal as of right is afforded. 9/ In seven States provision is made for disbarment by either a lower court or by the highest court of the State, but if disbarment is effected at the lower court level, then an appeal to the highest court is guaranteed. 10/

[Footnote continued from previous page:]
(1967); Utah Code Ann., §78-51-37 (1953); Vt. Stat. Ann., Title 4, §§901-906 (1972); Rev. Code Wash. Ann., Title 2 (1961); Wisc. Stat. Ann., §256.283 (Supp. 1974); Wyo. Stat. Ann., Vol. 2A, R. Disc. Code V-X (1957).

9/ Ala. Code, Title 46, §§33, 49 (Recom. 1958); Ark. Stat. Ann., §25-401, et seq. (1962); Conn. Gen. Stat. Ann., Title 51 (1958); Fla. R. Ct., R. Fla. Bar XI (1975); Code of Ga. Ann., Title 9, Disc. R. (App. 1973); Iowa Code Ann., §610 (Supp. 1974); Me. Rev. Stat. Ann., Title 4, §§801-855 (Supp. 1974); Md. Ann. Code, Art. 10 (Supp. 1974)

10/ Ann. Laws Mass., ch. 221, §40 (1974); Mich. Comp. Laws Ann., ch. 600 R. State Bar 16.17 (1968); Mo. Rev. Stat. §484.190-270 (1949); N.C. Genl. Stat. Ann., §84-28(1) (1975); Ohio Rev. Code Ann., §4705.01, et seq. (1971); Code of Va., Title 54 (1974); W. Va. Code, ch. 30 (1971).

Denial of Due Process

Petitioner's right to appellate review on all questions in an attorney disciplinary proceeding is not derived solely from the Equal Protection Clause; the Due Process Clause guarantees it as well.

While it is generally true that due process does not require a State to provide litigants with appellate review, the same is not true where, as here, the State has failed to provide for a full and fair hearing in the court of original jurisdiction. As this Court stated in Ohio ex rel. Bryant v. Adron Metropolitan Park District, 281 U.S. 74, 80 (1929):

> "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." (Emphasis added.)

Accord, Lindsey v. Normet, supra, 405 U.S. at 56.

The cases establishing the proposition that "appeal is a matter of grace, not right ... also assumes that the thwarted appellant has been accorded one fair hearing." States Marine Lines, Inc. v. Federal Maritime Commission, 376 F. 2d 230, 241, n. 25 (D.C. Cir., 1967).

However, as we show in the following sections of this petition, the Appellate Division did not afford petitioner at least "one fair hearing" because that tribunal adjudicated petitioner guilty of unprofessional conduct without ever hearing testimony and without permitting testimony on the critical questio before it, namely, whether the guilty pleas established unprofessional conduct and whether he was in fact guilty.

The issue relating to a denial of a right to appeal in New York disciplinary proceedings is currently the subject of parallel litigation before a three-judge federal court in the United States District Court for the Eastern District of New York in three consolidated cases in which oral argument was had on March 12, 1975. 11/ As of the date of this petition, no decision has been rendered by that court.

II.

PETITIONER PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER THE RULE OF BAXSTROM V. HEROLD, 383 U.S. 107 (1966), SPECHT V. PATTERSON, 386 U.S. 605 (1967), AND HUMPHREY V. CADY, 405 U.S. 504 (1972), IS APPLICABLE TO LAWYER DISCIPLINARY PROCEEDINGS WHERE A COLLATERAL CONSEQUENCE OF DISBARMENT IS SOUGHT TO BE BASED UPON A PRIOR MISDEMEANOR CONVICTION.

Baxstrom, Specht, and Humphrey made clear that before a collateral consequence of a conviction could be imposed, a due process hearing was

11/ Gerzof v. Gulotta, No. 74-C-1684; Levin v. Gulotta, No. 74-C-1668; and Mildner v. Gulotta, No. 74-C-1101. The panel consists of Circuit Judge Leonard Moore and District Court Judges Weinstein and Neaher. The cases all involve New York lawyes who were suspended by the Appellate Division and are complaining of the denial of a right to appeal. Pending determination by the three-judge court, the suspensions have been stayed.

required to determine the issue as to whether that secondary consequence properly flowed from the conviction. Specht and Humphrey dealt with one who had been convicted of a sex offense and was facing additional and collateral punishment under a sex offense statute; Baxstrom involved commitment for mental incompetence following a conviction for crime.

This case presents the issue as to the application of the foregoing principles to lawyer discipline as a collateral consequence of a prior conviction of a misdemeanor for conduct not as a lawyer. In New York, as in many other States (43 Cornell Law Quarterly, 489, 490 (1958)), conviction of a felony results in automatic disbarment with no adjudication proceeding of any sort. But conviction of a misdemeanor does not necessarily but may bring about disciplinary consequences following a proceeding to determine whether the conviction establishes aspects of "moral turpitude." In re McNally, 252 App. Div. 550, 300 N.Y.S. 459, 460 (1937); In re Smith, 216 App. Div. 173, 213 N.Y.S. 751 (1926).

In re Ruffalo, 390 U.S. 544, 550 (1968), establishes that a disciplinary proceeding of a lawyer is "of a quasi-criminal nature" and that the basic requirements of due process apply. Of course we recognize that "once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Gross v. Lopez, 42 L. ed. 2d 725, 737 (1975). If, as in this case, the proceeding results in disbarment--effectively capital punishment as a lawyer--due process would certainly require notice and a hearing with an opportunity to present evidence relating to the crucial question, i.e., whether the conviction established unprofessional conduct.

The proceeding before the Appellate Division plainly lacked due process under the Baxstrom, Specht, and Humphrey doctrine because no hearing was ever afforded on the issue decided by the first decision of the Appellate Division dated December 17, 1973, wherein that court determined that the circumstances on which petitioner was convicted for misdemeanors in Maryland and New York merited a finding of "guilt" of professional misconduct. It was in that decision that the Appellate Division adjudicated guilt of professional misconduct; everything thereafter was purely a mitigation hearing. But, as pointed out above, in New York, not every misdemeanor, and certainly not every assault or weapons conviction, establishes professional misconduct. It is rather the content of the conduct which is indicated by the conviction and the subsequent conduct of the individual which may or may not establish lack of professional responsibility. It is that very determination which requires a hearing and an adjudicative process which comports with due process of law. That was precisely denied by the Appellate Division when it acted solely upon the basis of a petition and answer, without affording a hearing before adjudicating guilt.

While we do not concede the point, we suppose it could be contended that some types of convictions of a lawyer require no further hearing to determine questions of an attorney's unprofessional conduct, e.g., theft of a client's money; but where one deals with misdemeanor convictions plainly outside of his functioning as an attorney, then it seems obvious that a due process hearing is required to bridge the gap between the conduct of which the attorney is convicted and the question whether that conduct can justify the finding of professional misconduct.

Many States seem to provide for a hearing on the question whether a particular misdemeanor conviction in lawyer discipline cases establishes professional misconduct. 12/ But the issue is quite obscure and in some States no due process hearing is so provided. 13/ Remarkably, there are very few decisions which contain any articulate discussion of the issue.

In In re Ming, 469 F. 2d 1352 (1972), the Seventh Circuit considered disciplinary proceedings against a lawyer who, after a trial, had been convicted on four counts of wilfully and knowingly failing to file federal income tax returns. Subsequently, a petition based on these convictions was filed, seeking his disbarment or suspension from the practice of

12/ Some State statutes specifically so provide: Ariz. R. Sup. Ct., §29(c) (1973); West Ann. Calif. Bus. & Prof. Code, §6102(b) (1974); Colo. Rev. Stat. Ann. R. Civ. P., §258 (1973); La. Stat. Ann., Art. 15, ch. 4 app. (1974); Pa. Sup. Ct. R. 17-13, 17-14 (1974); S.D. Comp. L., ch. 16-19 (1967); Code of Va., §54-74(6) (1974); Wisc. Stat. Ann.,§256.283-.285 (1971).

In some States, the hearing is required by judicial decision; for example: People ex rel. Attorney General v. Edison, 100 Colo. 574, 69 P. 2d 247 (1937); In re Dampier, 267 P. 452 (1928); In re Grossgold, 58 Ill. 2d 9, 317 N.E. 2d 45 (1974); In re Sauer, 390 Mich. 449, 213 N.W. 2d 102 (1973); In re Burton, 257 N.C. 534, 126 S.E. 2d 581 (1962); In re Stolper, 185 Okla. 459, 94 P. 2d 832 (1939); In re Corcoran, 215 Ore. 660, 337 P. 2d 307 (1959).

13/ Miss. Code Ann., §73-3-301 to 373 (Supp. 1974); Hawaii Rev. St., Title 32, §605 (Supp.1974); Tenn. Code Ann., §29-309, et seq. (1956).

law in the same court. Ming filed an answer, stating inter alia that he was not guilty of the offenses charged. Then, "without a hearing and with only the petition and the answer before it, the Executive Committee [of the United States District Court] ... suspended Ming from practice." 467 F. 2d at 1353. The Court of Appeals reversed because "the lack of a hearing before the Executive Committee constituted a denial of due process." Ibid.

Louisiana State Bar Association v. Ehmig, (La.) 277 So. 2d 137 (1973), dealt with disbarment for conviction of a "serious crime." The attorney in that case had been convicted after a trial of a tax fraud which was classified as a felony. The court held the attorney was entitled to a due process hearing on the issue whether this was a "serious crime." See also, In re Burton, 257 N.C. 534, 126 S.E. 2d 581 (1962); In re Lewis, 389 Mich. 668, 209 N.W. 2d 203 (1973); In the Matter of Sauer, 300 Mich. 449, 213 N.W. 2d 102 (1973).

The paucity of discussion of the nature of the hearing required to bridge the gap between prior conviction of a misdemeanor and a determination of professional misconduct in lawyer discipline cases emphasizes the need for this Court's granting this petition so as to provide appropriate Constitutional guidelines as to minimal due process standards for this type of case. And the facts in the instant case, as outlined above, provide an extreme example of the consequences of the absence of such direction from this Court.

III.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY, WHETHER, DESPITE A PLEA OF INNOCENCE MADE UNDER THIS COURT'S RULING IN NORTH CAROLINA V. ALFORD, 400 U.S. 25 (1970), THAT ASSERTION OF INNOCENCE MAY BE IGNORED IN A BAR DISCIPLINARY PROCEEDING WHICH CONSIDERS THE COLLATERAL CONSEQUENCES OF A CONVICTION.

Aside from Constitutionally mandated procedural requirements for the transition from a misdemeanor conviction to a finding of professional misconduct, there is the separate question of the binding nature of the conviction.

The general direction of the law as fixed by statute seems to be that at least in this field a misdemeanor conviction is "binding" or "conclusive" and the attorney may not go behind it. 14/ But

14/ Ala. Code, Title 46, §§33, 49 (Supp. 1974); Ariz. R. Sup. Ct. 29(c) (1973); Ark. Stat. Ann., §25-410 (1962); West Ann. Calif. Code Bus. & Prof. Code, §6101 (1974); Colo. Rev. Stat. Ann. R.C. Pro., §258 (1973); Code of Ga. Ann., Title 9, Disc. R., §9-501 (1973); Idaho Code, Title 3, §3-301 (1974); Iowa Code Ann., §610, 24 (Supp. 1974); Ky. Rev. Stat. Ann. R. Ct. App., §3.320 (1974); La. Rev. Stat. Ann., Art. 15, ch. 4, §8 (1974); Minn. Stat. Ann., §480.15 (1971); Miss. Code Ann., §73-3-339 (Supp. 1974); Mont. Stat., §93-2017, et seq. (1973); Nev. Sup. Ct. R. 99 (1957); N. M. Stat., §18-1-20 (1953); Ore. Rev.
[Footnote continued on next page.]

aside from the fact that such an approach seems to conflict with that applied in other fields of law, 15/ a serious question is raised as to whether such an analysis comports with due process where there was no trial in the criminal proceeding and where there was an assertion of innocence--a procedure permitted by this Court under its ruling in Alford.

In Alford, this Court held that a plea of guilty may be accepted by a court despite a claim of innocence. As this Court there pointed out, there are many reasons why a defendant may choose that course, commonly a vast difference between the charge that would be pressed at trial and that for which a plea would be accepted.

But why does one press an assertion of innocence despite a plea of guilty? Obviously, the defendant may believe he is in fact not guilty and does not wish his plea to be binding upon him in a collateral

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Stat., §9.560-9.480 (Supp. 1975); S.D. Comp. L., §16-19-2 (1967); Utah Code Ann., §78-51-37 (1953); Rev. Code Wash. Ann., §2.48.220 (1961); Wisc. Stat. Ann., §256.283(7) (Supp. 1974); Wyo. Stat. Ann., Vol. 2A, R. Disc. Code X (1957). All the foregoing statutes deal with conviction of a misdemeanor involving moral turpitude or a serious crime.

15/ St. Paul Fire & Marine Insurance Co. v. Lack, 476 F. 2d 583 (4th Cir., 1973) (plea of guilty to manslaughter not binding in subsequent civil suit even though manslaughter is defined as intentional killing); semble, State Farm Mutual Auto Ins. Co. v. Worthington, 405 F. 2d 683 (8th Cir., 1969); Franklin Life Ins. Co. v. Strickland, 376 F. Supp. 280 (N.D. Miss., 1974); Kerr v. Commissioner of Internal Revenue, 351 F. 2d 1 (2nd Cir., 1965) (plea of guilty to tax fraud not conclusive on government's claim for deficiency).

proceeding. That is the basic design of the Alford plea.

This Court's decision in Alford effectively loosened the joints of the criminal process by encouraging plea bargaining on the foregoing basis. This case presents the issue whether the entire design of an Alford plea may be frustrated by holding that the defendant is bound in a collateral proceeding as if he had admitted guilt or stood trial and been convicted.

We wish to emphasize that the issue is not whether guilty pleas are binding in the case in which they are entered. The issue is solely whether they are binding in a case dealing entirely with their collateral consequences. Alford's holding is precisely designed to permit a finding of guilt in a criminal case while leaving the collateral consequences open for subsequent determination. After all, it is that distinction which explains why a person is willing to enter a guilty plea. To take away that distinction is to destroy the whole meaning of Alford.

In addition, because these pleas were entered in confident reliance upon the official declaration of the law as set forth in Alford, the denial of a full hearing on the issue of guilt constitutes "an indefensible sort of entrapment by the State," prohibited by Raley v. Ohio, 360 U.S. 423, 426 (1959), and Cox v. Louisiana, 379 U.S. 559 (1965). As this Court said, "convicting a citizen for exercising a privilege which the State had clearly told him was available to him" is a denial of due process. 360 U.S. at 425-26; 379 U.S. at 571. In the same way, petitioner's disbarment by the New York court without an opportunity to substantiate his continued assertions of innocence to the prior charges penalizes him for acting in reliance upon the statement of law clearly expressed by this Court in Alford. Such a penalty is an unconstitutional denial of due process.

IV.

THE PETITION PRESENTS FOR REVIEW A FEDERAL QUESTION OF SUBSTANCE DECIDED BY THE APPELLATE DIVISION IN A WAY NOT IN ACCORD WITH DECISIONS OF THIS COURT, NAMELY, WHETHER IN A DISCIPLINARY PROCEEDING AGAINST A LAWYER, DISBARMENT MAY ENSUE a) FROM CHARGES NOT INCLUDED IN THE DISCIPLINARY COMPLAINT, b) FROM ASSERTIONS OF A PROSECUTOR UNSUPPORTED BY EVIDENCE, AND c) ON THE BASIS OF INDICTMENTS WHICH HAD BEEN WITHDRAWN.

In re Ruffalo, supra, dealt specifically with the requirements of "fair notice of the charge" in a lawyer disciplinary proceeding, as part of the overall entitlement to due process in such proceedings. Analysis of the details of the procedure before the Appellate Division in this case shows a pervasive denial of the elements of due process in every facet of the proceeding.

A.

The petition filed by the Bar Association charged petitioner with conviction of two misdemeanors. But it is plain on its face that the Appellate Division decision of disbarment was based not on those convictions but on a charge of involvement in a conspiracy to murder and a charge of escape to Canada, both of which were expressly dropped.

Nothing in the petition filed by the Bar Association would give warning that it was pressing for discipline on charges other than those of which petitioner

had been convicted. While it is true that the petition had annexed to it transcripts of the court proceedings, the pleading shows that guilt of "unprofessional conduct" was being charged on the basis of the misdemeanor convictions.

Of course an attorney may be found guilty of unprofessional conduct in respect to actions which did not produce a conviction; but that was not the point of the petition. Had it been such, the issue before the Appellate Division would have been whether the attorney had committed the charged acts and proof of innocence would have been permitted. But the Appellate Division insisted it was proceeding only upon the basis of the convictions of misdemeanors, and indeed it did not permit him to go behind the convictions. Yet that is exactly what the Appellate Division did when its opinion emphasized that it viewed the matter as by no means involving a simple assault or a possession of weapons charge. Thus, disbarment was based not on convictions for misdemeanors with which petitioner was charged, but on items of which he was not charged in the petition or permitted to refute.

This is precisely prohibited by In re Ruffalo, supra. We do not believe that the procedural constraints of that case may be overcome by the method of bifurcating the proceedings from the imposition of sentence. If the net result of both proceedings is, as in this case, disbarment for matters not charged, then that is plainly prohibited by Ruffalo.

B.

The entire basis for the Appellate Division's disbarment ruling was the prosecutors' assertions of what they would have attempted to prove had there been a trial.

Such a procedure was entirely appropriate in the Maryland and New York misdemeanor proceedings involving the question whether those courts would accept a guilty plea. But when the matter is moved to collateral consequences, how can mere assertions of a prosecutor, unsupported by evidence under oath and subject to cross-examination, be taken as fact?

Granted, as mentioned above, that once it is determined that due process applies, the question remains, "What process is due?", Morrissey v. Brewer, supra, the foregoing procedure does not meet even the most minimal standard of due process.

The judge in Maryland was quite aware of the shakiness of some of the State's witnesses and said so on the record (supra, n. 3). There the petitioner was willing that the prosecutor's statement be accepted with his own counsel's assertion of innocence. But in this case he disputed those facts and yet the Appellate Division, without affording a hearing, assumed as proven fact what a prosecutor said he hoped to establish on direct and before cross-examination.

In Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963), this Court, in dealing with New York Bar admission procedures, insisted on procedural due process so that an applicant would have an opportunity to confront and cross-examine his accusers. Such a requirement would certainly be required in disbarment proceedings.

C.

It is evident that the basis upon which the Appellate Division disbarred petitioner was for alleged conduct embodied within indictments which were withdrawn. We suppose that had the Bar Association undertaken to prove that, despite the withdrawal

of the indictments, petitioner nevertheless committed the alleged acts, that might have been an acceptable mode of attack. But in that case, the Bar Association would have been required to prove its contentions by the normal standards of an adversary proceeding, i.e., witnesses subject to cross-examination. The Bar Association certainly could not rely upon withdrawn indictments supported by unverified contentions by the prosecutor as to what he might have proved on direct and before cross-examination if he had not withdrawn the indictments. Yet that is exactly what occurred in this case.

CONCLUSION

There is a pervasive lack of clarity of the extent to which due process and equal protection govern lawyer disciplinary actions. The Court's decision in Ruffalo was important in emphasizing that Constitutional restraints do govern such proceedings. But, as is obvious from this case, there remain numerous questions of procedure in respect to such cases where Constitutional guidelines should be delineated.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON STAVIS
DORIS PETERSON
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Dated:
June 16, 1975.

APPENDIX

Fourteenth Amendment Section 1,
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Constitution, Article 6, §3
[Jurisdiction of the Court of Appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record or original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of

public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon the application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion

a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

New York Judiciary Law, §90

(2) The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of prossional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in conncection with the application for admission to practice.

(8) Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceedings upon questions of law involved therein, subject to the limitations prescribed by article six, section seven of the constitution of this state.

December 17, 1973

APPELLATE DIVISION
OF THE
SUPREME COURT
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

PRESENT: DEL VECCHIO, J.P., MARSH, MOULE, CARDAMONE, SIMONS, J.J.

In the Matter of ARTHUR F. TURCO, Jr., an attorney, Respondent,

Monroe County Bar Association, Petitioner.

Upon reading and filing the petition of the Monroe County Bar Association, verified the 8th day of May,1973 by Anthony R. Palermo, President, alleging that respondent is or may be guilty of professional misconduct in his office as an attorney and counselor at law, together with the exhibits annexed thereto, the answer of Arthur F. Turco, Jr., filed the 21st day of June, 1973, in which he requests that the charges be dismissed, or, in the alternative, for other relief, together with the appendix annexed thereto, and after hearing Mr. Bruce E. Hansen and Mr. Michael F. Tomaino, of counsel for petitioner, and Mr. Harold P. Fahringer, of counsel for respondent, and due deliberation having been had thereon,

This Court hereby finds that respondent is guilty of professional misconduct in his office as an attorney and counselor at law, and

It is hereby ORDERED, that if respondent desires a hearing in mitigation of the discipline to be adjudged, he may so advise the Court within twenty days from the date of the entry of this order and such hearing will be accorded to him.

Memorandum: In Maryland, respondent was indicted and tried for conspiracy to commit murder, assault with intent to murder and other crimes. After the jury disagreed and a new trial was ordered, respondent plead guilty to common law assault. Thereafter, respondent was arrested and charged in the Criminal Court of the City of New York with possession of dangerous weapons and ammunition therefor, possession of dangerous drugs and other crimes. He plead guilty to possession of a dangerous weapon in violation of §265.05 of the Penal Law in full satisfaction of these charges and an additional charge of jumping bail and fleeing the jurisdiction. By reason of the above two convictions of respondent the Monroe County Bar Association has petitioned this Court under Section 90 of the Judiciary Law for disciplinary action against him. In his answer, respondent admits the convictions but seeks to prove that in fact, he was not guilty

of the charges to which he plead guilty; and he asserts that the petition is insufficient in law and he moves for its dismissal. We conclude that the petition is sufficient and that the motion should be denied. We also conclude that North Carolina v. Alford (400 U.S. 25), on which respondent relies, does not support his contention that he has the right now to prove that he was not guilty of the charges as he plead. In Alford, supra, the court merely held that it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indictment, provided the plea is voluntarily made (see, in accord, People v. Clairborne, 29 N.Y. 2d 950; People v. Foster, 19 N.Y. 2d 150; People v. Griffin, 7 N.Y. 2d 511). No claim is made here that respondent's pleas were not voluntary.

Although respondent suggests that his pleas were reluctantly made and were similar to pleas nolo contendere and hence of no effect in another proceeding (see Matter of Kimball, 33 N.Y. 2d 5) the plea of nolo contendere has been abolished in New York (Ando v. Woodberry, 8 N.Y. 2d 165, 170), and the records of respondent's pleas show conclusively that they were nothing less than pleas of guilty to reduced charges. In the absence of a contention that respondent has evidence "which was unavailable to him" at the time of those pleas (see Matter of Keogh , 17 N.Y. 2d 479, 481), we deem the two convictions to be final and binding upon him.

These acts of which respondent stands convicted constitute professional misconduct on his part in violation of Canons of Professional Ethics, Nos. 29 and 32, and of the Code of Professional Responsibility, Disciplinary Rules, No. 1-102(A)(3)(5) and (6), namely, that a lawyer should strive at all times to uphold the honor and maintain the integrity of the profession, and will find his highest honor as an honest man; and that he will engage in no illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law. For such misconduct respondent should be disciplined.

If respondent desires a hearing in mitigation of the discipline to be adjudged, he may so advise the court within 20 days of the entry of the order hereon, and such a hearing will be accorded to him.

It is hereby further ORDERED, that pursuant to Judiciary Law, §90, this Order, being intermediate, is confidential and not published.

Enter.

LESTER A. FANNING

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of Arthur F. Turco, Jr.,
an attorney, Respondent,

Monroe County Bar Association,
Petitioner.

Decided: January 28, 1975

PRESENT: HON. JOHN S. MARSH, Presiding Justice
HON. REID S. MOULE,
HON. RICHARD D. SIMONS,
HON. WALTER J. MAHONEY,
HON. FRANK DEL VECCHIO,
Associate Judges

APPEARANCES:

MICHAEL T. TOMAINO
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Attorney for Petitioner

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HERALD PRICE FAHRINGER, ESQ.
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Attorney for Respondent

OPINION

Per Curiam:

Respondent was admitted to the New York Bar on December 21, 1967 in the First Department. He practiced law in the metropolitan area and environs for several years, and in August, 1971 he moved to Rochester, employed as attorney for the new Bail Fund established in Rochester. After six months that employment terminated and he entered private practice in Rochester and vicinity.

In February, 1972 in Baltimore, Maryland he entered a plea of guilty of common-law assault, a misdemeanor, in satisfaction of May, 1970 indictments against him and others, including a charge of conspiracy to murder and assault with intent to murder, and he was sentenced to a term of five years in the custody of the Department of Correction; but the sentence was suspended and he was released on condition of good behavior for five years. In respect of this, the sentencing judge said,"If, as Mr. Kunstler suggests, Mr. Turco intends to leave Maryland and take up his activities elsewhere, I can see no useful purpose to be served by active supervision by the Probation Department."

Thereafter, on March 8, 1972 in the Criminal Court of the City of New York, New York County, respondent entered a plea of guilty of unlawful possession of a weapon in violation of Section 265.05

of the Penal Law, as a misdemeanor, in satisfaction of multiple charges made against him and another in February, 1970, including possession of dangerous weapons and drugs, and, later, bail jumping and fleeing the jurisdiction, and he was given a sentence of conditional discharge. He continued to practice law in the Monroe County area.

Under date of May 8, 1973, following a year-long investigation, the Monroe County Bar Association filed a petition with this Court attaching thereto the proceedings underlying the above convictions, and asked this Court to determine whether respondent should be disciplined by reason of such convictions. Respondent appeared, interposed an extensive answer and moved for change of venue to the First Department, and, in case that was denied, for a hearing on the validity of the convictions as predicates for disciplinary proceedings. We denied the motion for change of venue and received briefs on the question of the right of respondent to present evidence to prove that in fact he was not guilty of the crimes for which he was convicted. In support of his contention, respondent relied on North Carolina v. Alford (400 U.S. 25).

We concluded that the Alford case does not support respondent's contention; that in Alford, supra, the court merely held that it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indict-

ment, provided the plea is voluntarily made (see, accord, People v. Clairborne, 29 N.Y. 2d 950; People v. Foster, 19 N.Y. 2d 150; People v. Griffin, 7 N.Y. 2d 511). As we shall point out later herein, no claim is made, nor can there be, that either of respondent's above guilty pleas was involuntary.

Although respondent suggested that his pleas were reluctantly made and were similar to pleas of nolo contendere and hence of no effect in another proceeding (see Matter of Kimball, 33 N.Y. 2d 586), the plea of nolo contendere has been abolished in New York (Ando v. Woodbury, 8 N.Y. 2d 165, 170) and the records of respondent's pleas show conclusively that they were nothing less than pleas of guilty to reduced charges to avoid convictions for the more serious charges and the severe sentences likely to be imposed thereon. We ruled, therefore, that in the absence of a contention that respondent has evidence "which was unavailable to him" at the time of those pleas (see Matter of Keogh, 17 N.Y. 2d 479, 481) the convictions were final and binding upon him. We concluded that the acts to which respondent pleaded guilty constitute professional misconduct on his part in violation of Canons of Professional Ethics, Nos. 29 and 32, and of the Code of Professional Responsibility, Disciplinary Rules No. 1-102 (A)(3)(5) and (6), namely, that a lawyer should strive at all times to uphold the honor and maintain the integrity of the profession and will find his highest honor

as an honest man and as a patriotic and loyal citizen, and that he will engage in no illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law; and that for such misconduct, respondent must be disciplined. We gave respondent the opportunity, however, to have a hearing in mitigation of the discipline to be adjudged.

Respondent requested such a hearing, and a justice of the Supreme Court was designated to hear and report the evidence presented on such hearing. The hearing was held over a period of seven days and is contained in 800 pages of minutes. Respondent called over 45 witnesses, about 40 of whom were from the Rochester area who did not know respondent before he came to Rochester in 1971 and did not know anything of his prior conduct. They testified to his high ability as a lawyer and his good character. The hearing justice gave respondent full leeway and opportunity to explain his conduct and his reasons for pleading guilty. Respondent's testimony and supporting evidence submitted in refutation of the evidence which the State's Attorney in Maryland and the District Attorney in New York stated to the respective courts that they would present on trial of respondent if he did not plead guilty, was detailed and quite complete. In consideration of the matter of mitigation we have reviewed the evidence underlying the charges against

respondent which led to his plea of guilty in each of his convictions, and his explanations thereof.

In 1968, soon after he was admitted to the Bar, respondent began employment by William Kunstler in Manhattan. He soon was engaged in representing the Black Panther Party. He testified that Messrs. Kunstler, Lefcourt and he were the first attorneys to represent the Black Panthers on the East coast of the United States, that their services required respondent's appearance in various cities from New England southerly in the East coastal States to Maryland, and that the services were rendered for little or no fee, as the circumstances required. He also represented other indigent persons. He assisted Mr. Lefcourt in a nine-months' trial of the so-called "Panther 21" in New York City.

In February, 1969,members of the Black Panther Party in Baltimore, Maryland were accused of arson, bombing and other crimes. Members of that Party who were residents in New York were extradited to Maryland, and respondent went there to represent them. From the statement of testimony which the State's Attorney of Maryland advised the Criminal Court of Baltimore, at the time of respondent's conviction there, that he was prepared to present against respondent upon his second trial and which respondent stipulated would be the testimony against him, it appears that in the early summer of 1969 respondent was en-

gaged in rendering more than normal legal services for the Black Panthers in Maryland. He joined members of the Black Panther Party on the streets of Baltimore in passing out editions of the Panther paper; he presided over political action classes of the Black Panther Party; and he took an active part in the activities of that Party there. He testified that he also traveled to many eastern United State cities, setting up police control districts, a project sponsored by the Black Panthers, and he advised the Party in connection therewith.

It was stipulated before the Maryland court that if the second trial of respondent were to proceed, the State's witnesses would testify to the following facts:

In early July, 1969, one Eugene Leroy Anderson joined the members of the Black Panthers Party and respondent in the distribution of Black Panther literature on the streets of Baltimore. On July 10 Anderson appeared at the Black Panthers' headquarters in Baltimore and became involved in an argument with certain members there. It appears that a Captain of the Panthers had been demoted and some members wanted him restored. There was also suspicion that some members were divulging to the police certain Black Panther activities. A number of Black Panthers forcibly carried Anderson upstairs, followed by respondent. There Anderson was slapped, punched and beaten. On one occasion he

fell against a file cabinet and respondent grabbed him and threw him to the floor, and another member kicked him in the groin causing him to yell out in pain. A cloth was stuck in his mouth to quiet him. Water in a pan was brought to boil, sugar was put into it and a hunting dagger was heated in it. The dagger was then placed in the skin under his eye and turned "rolling it down the face, which removed the first layer of skin on Anderson's face." The same thing was then done to his chest. A member took Anderson by the head, placed a .38 caliber revolver against it and said that he was going to kill him. Another member lit a cigarette and placed it against Anderson's face under his eye, burning him. Members present, including respondent, continued beating Anderson, sometimes with bed slats. Respondent then said, "We can't keep him here; we have to off him," meaning "We have to get rid of him [Anderson], we have to kill him." Anderson was kept there under guard all night and the next day, and was tied up and put in a closet. Anderson was called a "pig" who had been caught-- apparently squealing.

Two Black Panther members, Loney and Wyche, who had supported the demoted Captain, were berated by one Mitchell. Respondent was present at the time and encouraged Mitchell in his derogatory remarks against them. Mitchell and respondent told them that they could get back in the good graces of the Party by disposing of Anderson and respondent told them to "go ahead and do what they had to do with Anderson."

The State's Attorney stated to the court that Loney would testify that Wyche and he, with one Johnson, then drove out to find a spot where they could kill Anderson, and they found one. That night after respondent had finished presiding over a Black Panther political action class, he told Wyche and Loney to "go and do what you have to do," meaning "get rid of Anderson." Later that night, July 11, Wyche, Loney, Johnson, Young and another got a gun and took Anderson in an automobile to the spot previously selected. Loney stayed in the car while the others took Anderson into the woods. Loney heard the gun blast, and the escort soon returned without Anderson. Wyche reported that he had shot Anderson.

The State's Attorney stated that another witness, Barbara Zentz, would testify that she expected respondent to come to her house that evening on a social visit. He was late, and she fell asleep waiting for him. He came after 1:30 a.m. on July 12 and awakened her. He was extremely agitated and had a revolver in his hand which he waved, and he said that if "they" (meaning the authorities) came to get him, "he would take some of them with him." He asked her to hide him but she declined.

In October, 1969 the body of Anderson was found in Leakin Park, Baltimore, and it was duly identified.

On February 22, 1970 in Manhattan, New York the police, acting on a tip, apprehended four adults and found that one of them was carrying an automatic gun. They arrested the four and were about to place them in police cars to take them to the stationhouse when three other men appeared, one being Alan Weiser, a lawyer. He told the police that they had no right to arrest the four or take them in, and he stood between the men and the police cars to prevent such police action. The other two with Weiser aided him, and so the police also arrested the three. Weiser gave his address as 674 W. 161st Street, Apartment 6-G.

Officers Valois and Nichols then went to that apartment and kocked. Someone within asked who was there, and they replied "Police officers." It happened that there was an uncovered peephole in the door, and Officer Valois looked in and saw a man standing there holding a gun in his hand. The man (James Grace) dropped the gun and started running down the hall of the apartment. Officer Valois broke into the apartment and found that the gun was a M-1 carbine loaded with a banana clip of 30 rounds of bullets. He caught Grace in the kitchen and he called out that everyone was under arrest. Respondent and two girls then came out of a door near the kitchen. In the living room the officers saw a shotgun leaning against the window and 12 live shells on the windowsill; and they found on an end table two plastic

bags, one containing marijuana and the other 125 green pills. While Officer Nichols was lining up his prisoners he heard a door open to his left. He looked and saw into a room next to the kitchen holstered revolvers and bandoliers full of shells on top of a valise only about five feet from him. He immediately seized them.

Respondent ther spoke up, saying, "What are you guys doing? All these guns are registered." Officer Nichols said, "What about the small guns?", and respondent answered,"These weapons are all mine and they are all registered." Respondent admitted that he and his girlfriend, whom he later married, were also living in the apartment.The officers found 75 hypodermic needles in the apartment; and they learned that the revolvers were not registered or licensed.

On February 23, 1970, Weiser and respondent were charged with possession of dangerous weapons, dangerous drugs, hypodermic instruments and obstructing government administration. Respondent pled not guilty and he was released on bail. His motion to suppress the guns, ammunition, drugs and his statements that the guns were his was denied.

On the mitigation hearing herein, respondent testified that in the course of his activities in behalf of liberal causes he made many speaking appearances and that in late April, 1970 he went to Montreal, Canada to make a speech at McGill University, intending

to return in a day or two. The fact that he was out on bail did not deter him from leaving the State without permission. He did not, however, speak in Montreal.

On May 1, 1970 respondent was indicted in Maryland along with Mitchell, Wyche and another for conspiring to murder Eugene Leroy Anderson on July 11, 1969; and he also was indicted with Mitchell and others for assaulting Anderson with intent to murder him and for common law assault. Respondent testified that McGill University cancelled his speech on learning of his indictment. Respondent learned of the indictment almost immediately and he testified that through an associate attorney in Baltimore he unsuccessfully negotiated to be released on bail if he returned to Maryland.

Respondent remained in Canada for 7 1/2 months. During this time he forged a lost identification card which came into his possession, falsifying it as his own, and he assumed the name of Leon Wright. He made no attempt to appear in the case pending against him in Manhattan and his bail there was forfeited. In mid-October, 1970 an official in Canada was kidnapped, a state of emergency was declared and the police investigated thousands of persons. In the course of this investigation, respondent was "picked up" and he gave his name as Leon Wright, using his false identification card. His identity was discovered, nowever; and the police, on

learning that he was under indictment for murder in Maryland, notified the Maryland authorities, and they began an extradition proceeding against him.

In the course of such extradition proceeding, respondent signed a waiver, and in mid-December, 1970 he returned to Maryland with two Maryland police officers, where he was kept in jail until the end of his three weeks' trial in June and July, 1971. The jury acquitted the other defendants indicted with respondent, but they disagreed as to him. He was then released on bail, awaiting a new trial, and in the following month he first came to Rochester, as before stated. Although the other above-mentioned persons indicted with respondent were acquitted, one Irving Young was tried separately for the murder of Eugene Leroy Anderson and he was convicted thereof.

In February, 1972 the State's case against respondent in Maryland came on for retrial. At that time on February 14, 1972 respondent was represented by Mr. Buchman of Baltimore and Mr. Kunstler of New York. Only one of the four indictments (Nos. 2313, 2314, 2315, 2316) against respondent was called for trial, to wit, No. 2314, and Mr. Buchman stated that respondent would plead guilty to the second count thereof, that is, common law or simple assault, in satisfaction of all the indictments against him. The State's attorney told the court that the State recommended accepting the plea, being mindful that the first trial took

three weeks and that the second trial would probably take longer, that respondent had already spent many months in jail awaiting the first trial, and that by pleading guilty to assault, respondent was exposing himself to sanctions by the Bar Association of the State of New York and would be subject to disbarment proceedings in New York. Before considering whether the court would accept respondent's plea with the State's approval, Presiding Judge J. Harold Grady had respondent sworn and he questioned him to ascertain whether his plea was voluntarily made. The court elicited that respondent was an attorney at law and fully acquainted with the law of his case and his legal rights and had thoroughly discussed his case with his attorneys before offering to make his plea and was doing so voluntarily.

The court then called upon the State's attorney to present for the record the evidence which the State asserted supported the guilty plea. The State's attorney stated that respondent's attorney had stipulated that the evidence which the State's attorney was about to recite, including the names of the respective witnesses, would be the State's proof if the case proceeded to trial, and respondent's attorney agreed that such was the stipulation. The substance of such testimony was set forth above in describing the events surrounding the beating and shooting of Eugene Leroy Anderson. The testimony

also described the use by respondent of the falsified identification card in Canada and the false name of Leon Wright and the fact that he remained in Canada for 7 1/2 months until termination of the extradition proceedings against him.

Following such statement of the State's evidence, Mr. Kunstler, for respondent, stated the nature of the evidence which the defense would present were the case to proceed to trial. He stated that he would present evidence to show that respondent was in New York City, not Baltimore, on July 10 through July 12, 1969; and Mr. Kunstler stated that respondent contends that "he was totally innocent of all the charges." The court then said:

"It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina v. Alford; It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant."

* * *

"As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts.

Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was a factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis."

MRS. O'CONNER: Correct. We would ask the entire portion starting 'If Mr. Turco were called to the stand . . .' to be deleted at this point and the plea continue with the completion of the last witness, Mr. Clark.

MR. KUNSTLER: I would agree to that.

The court then stated:

"So that there be no misunderstanding of the state of the record in this case, at the outset of the State's recital of its evidence there was a stipulation that this would be the State's evidence as produced on direct examination. There has been no

stipulation or agreement by the State as to what the evidence offered by the defendant might be, so that there has been no stipulation on the part of the State to any evidence which would support the outline as given by Mr. Kunstler. Since the State's outline of its evidence clearly supports the plea of guilty, the crime of assault, and since the defendant elects to present no evidence to controvert this charge, the Court finds that there is in fact a factual basis for the plea of guilty to the crime of assault."

Before pronouncing sentence, the court concluded as follows:

> "As has been pointed out in the discussion here today, the defendant, Arthur Turco, is not a member of the Bar of the State of Maryland. However, I believe that there have been some suggestions that he has offered his services as an attorney to some persons in this jurisdiction who are charged with criminal offenses. The possibility of Mr. Turco participating in the defense of any criminal case in this State would depend upon his being presented to the Court by local counsel with a re-

> quest that he be permitted to participate in that one case only on a case-to-case basis. Speaking for myself only, and not attempting to speak for any other court in this jurisdiction, I would make it clear that if such an occasion would arise in the future, Mr. Turco would not be permitted by this Court to act as counsel in any criminal case at trial before this Court."

On March 8, 1972 respondent appeared in the criminal court of the City of New York, New York County, and offered to plead guilty to illegal possession of a dangerous weapon, a gun, in satisfaction of all charges against him, including bail jumping and fleeing the jurisdiction. His attorney, Mr. Lefcourt, stated that respondent had no knowledge of the presence of the handguns or marijuana in his apartment where he was arrested and that the hypodermic needles were for respondent's use as a diabetic. He did not attempt to explain why 75 hypodermic needles were needed for such purpose. He asserted that his plea was under North Carolina v. Alford, (400 U.S. 25, supra) and that respondent still claims that he was innocent.

The District Attorney replied that the facts "clearly demonstrate the guilt of the defendant," and he proceeded to recite them, as reviewed above; but he concluded by stating that he was willing to accept the one

plea in full satisfaction of all charges against respondent. Respondent's attorney stipulated that the People's witnesses would testify to the facts recited by the District Attorney.

The court then questioned respondent and ascertained that his plea was made freely and knowingly; and he added, "After having entered this plea, do you understand I will not permit you to withdraw it under Alford v. North Carolina, on the basis of your assertion of innocence, later on?" and respondent answered, "I understand, your Honor."

Respondent appealed from the judgment convicting him in Maryland. The appeal was argued on March 2, 1973 and on June 13, 1973 the court of Special Appeals of Maryland affirmed the judgment.

Respondent appealed from the judgment convicting him in New York County of illegal possession of a dangerous weapon, and on December 19, 1972 the Appellate term of the First Department unanimously affirmed the judgment.

With respect to the New York County conviction respondent testified on the mitigation hearing that he had moved into the Manhattan apartment only a few days before his arrest; that he brought with him two guns, the shotgun and the rifle, which he had formerly used for hunting; and that he registered them when he moved to Manhattan. he stated that the revolvers and ammunition there-

for were in the room of his co-defendant, Weiser, in the apartment and their presence was unknown to respondent. He admitted that he had in the apartment up to 200 shells for his shotgun and up to 150 shells for his rifle. He testified that when he told the officers that the guns were his he was referring only to the shotgun and rifle and not to the unlicensed revolvers, despite the officer's testimony that respondent's statement was in response to his question about the small guns. Respondent offered no explanation of how the shotgun and the rifle, purportedly used only on rare occasions for hunting, wer both in the living room with live ammunition in them and openly at hand.

Respondent further testified that the reason he falsified the identification card in Canada and carried it and used the name of Leon Wright was to avoid arrest and extradition to the United States.

Respondent reiterated on cross-examination that he pled guilty in Maryland and in New York County with full knowledge of the charges, facts and law and did so voluntarily and on advice of his counsel.

The essence of respondent's testimony on the mitigation hearing was (1) that because of his active defense of minority persons in Maryland, especially blacks, he could not get a fair trial there, and that is principally why he pled guilty rather than stand trial.

His wife's ill health and his lack of funds for counsel fees for his defense were also stated as important considerations; (2) that his wife's ill health and the expense of defending himself against the New York County charges were also why he pled guilty there; (3) that he has been devoted to the defense of minority groups and underprivileges persons, largely without fee, and has performed a public service for which he should be commended instead of being charged with unprofessional conduct; and (4) that since his convictions he has conducted himself in an exemplary manner, continuing to defend the poor and defenseless and unpopular causes, and should be permitted to continue to do so.

The petition herein charges respondent with misconduct by reason of the two convictions above described. We have determined that such misconduct requires that he be disciplined. In an effort to mitigate the discipline to be adjudged, respondent presented his version of the facts underlying and surrounding the convictions. In considering such testimony we necessarily have reviewed the countervailing proof, to wit, the facts which the State of Maryland and the People of New York stated that they would prove upon a trial to establish respondent's guilt, many of which facts were admitted by respondent or not denied. Those alleged facts and respondent's answers thereto are necessarily weighed by us in considering respondent's character and his respect for the law and his responsibility to the Bar as a lawyer.

The Maryland court accepted the recommended plea of common assault; but it clearly did not view the crime as a mere street corner fist-fight, for it imposed a five-year sentence, suspended during respondent's good behavior. After respondent's arraignment in New York County on the various charges there, the court recognized respondent's position as a member of the Bar and released him on bail on his own recognizance, thus relying on his integrity as an attorney-at-law to abide by the rules governing persons released on bail and to be available at all times for the prosecution of the case. Under such circumstances his admitted jumping bail, which in itself constituted the commission of a felony (Penal Law §205.40), shows a significant lack of good character. Although this fact is not a basis upon which the petition rests, in his testimony in mitigation respondent has adverted to his incognito stay in Canada, and such testimony must be considered in light of all the surrounding facts.

The evidence in behalf of respondent shows that he engaged in representing people who desperately needed representation and who often had difficulty finding able counsel, and that he, as an attorney, had a proper concern for underprivileged persons. The testimony of the many witnesses who testified to respondent's good character must, however, be recognized as based upon his conduct since he came to Rochester in 1971, during which time he was subject to the Maryland and New York County charges or

the pressure of the Bar Association's investigation for his prior misconduct. Were the admitted facts in this proceeding to appear on the record of an applicant for admission to the Bar, without doubt the application would be summarily denied.

In his argument in mitigation of respondent's conduct and consequent punishment, his counsel likens respondent's actions to those of an attorney who has been charged with tax fraud or tax evasion. We cannot accept such comparison. Defendant has been charged with crimes involving gross moral turpitude, including violence and a display of utter lack of moral responsibility. Even in his testimony at the mitigation hearing he evinced no showing of remorse or recognition of wrongdoing. Respondent's conduct in 1969 and 1970, as recited above, reveals that he had little respect for legal processes insofar as they applied to him and his ambitions. He left the arena of the lawyer in the proper defense of clients charged with crime and joined his clients in criminal activity and when caught in the web of the law, he refused to abide by lawful mandates and undertook illegal means to evade the law and conceal himself. He flouted the law. His actions were completely un-lawyer-like, unprincipled and far below any minimum standard of proper professional conduct. Such conduct in a practicing lawyer cannot be tolerated. For his admitted actions herein we have no choice

but to order that he be disbarred and that his name be stricken from the roll of attorneys of the State of New York.

An order should be entered accordingly.

Marsh, P.J., Moule, Simons, Mahoney and Del Vecchio, J.J., concur.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February A.D. 1975.

PRESENT, Hon. Charles D. Breitel,
Chief Judge, presiding.

4 No. 154

In the Matter of Arthur F. Turco, Jr.,
Appellant,

vs.

Monroe County Bar Association,
Respondent.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied, and it is

ORDERED, on the Court's own motion, that the appeal taken as of right be dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Clerk

THE RIGHT TO APPELLATE REVIEW
IN NEW YORK : DISCRIMINATION BETWEEN
ATTORNEYS AND ALL OTHERS

A. Professionals

Profession	Statutory Trier-of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
1. Attorneys	Appellate Division (Judiciary Law §90)	None - but leave to appeal may be addressed to Court of Appeals (Judiciary Law §90(8))	None as to facts; none as to law except when a constitutional issue is the only question or when a Justice of the Appellate Division dissents
2. Physicians, Chiropractors, Engineers, Accountants, Nurses, and all others	Board of Regents (Education Law §6510(3))	Appellate Division, Third Department (Education Law §6510(4))	All questions of law and "substantial evidence" test as to facts

covered by
Education Law
§6500-8208

B. Civil Litigants

Statutory Trier-of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
1. Supreme Court	Appellate Division (CPLR §5701(a))*	Questions of law and questions of fact (CPLR §5501(c))
2. County Court	Appellate Division (CPLR §5701(a))	Questions of law and questions of fact (CPLR §5501(c))
3. Family Court	Appellate Division (Family Court Act §1111)	Questions of law and questions of fact (CPLR§5501(c))

* "CPLR" refers to New York Civil Practice Law and Rules.

Statutory Trier-Of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
4. Surrogate's Court	Appellate Division (Surrogate's Court Act §2701)	Questions of law and questions of fact (CPLR §5501(c))
5. Court of Claims	Appellate Division, Third or Fourth Department (Court of Claims Act §24)	Questions of law and questions of fact (Court of Claims Act §24)
6. District Court	Appellate Term or County Court (Uniform District Court Act §1701)	Questions of law and questions of fact (CPLR §5501(d))
7. Civil Court, City of New York	Appellate Term (NYC Civil Court Act §1701)	Questions of law and questions of fact (CPLR §5501(d))
8. Other City Courts	Appellate Term or County Court (Uniform City Court Act §1701)	Questions of law and questions of fact (CPLR §5501(d))

Statutory Trier-of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
9. Justice Court	Appellate Term or County Court (Uniform Justice Court Act §1701)	Questions of law and questions of fact (CPLR§5501(d))
	C. Criminal Defendants	
1. Supreme Court	Appellate Division (CPL §450.60(1))*	Questions of law and issues of fact (CPL §470.15(1))
2. County Court	Appellate Division or Appellate Term (CPL §450.60(2))	Questions of law and issues of fact (CPL §470.15(1))
3. District Court	County Court or Appellate Term (CPL §450.60(3))	Questions of law and issues of fact (CPL §470.15(1))

* "CPL" refers to New York Criminal Procedure Law.

Statutory Trier-of-Fact	Court of Appellate Review as of Right	Scope of Appellate Review as of Right
4. Criminal Court, City of New York	Appellate Term (CPL §450.60(4))	Questions of law and issues of fact (CPL §470.15(1))
5. Other City Courts	County Court or Appellate Term (CPL §450.60(3))	Questions of law and issues of fact (CPL §470.15(1))
6. Justice Court	County Court or Appellate Term (CPL §450.60(3))	Questions of law and issues of fact (CPL §470.15(1))